



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL APPEAL NO. 60 OF 2017**

**MOMBASA TRADE CENTRE LIMITED.....APPELLANT**

**(ORIGINAL DEFENDANT)**

**VERSUS**

**MOKAYA OGUTU & COMPANY ADVOCATES.....RESPONDENT**

**(ORIGINAL PLAINTIFF)**

*(Being an Appeal against the Judgment and Decree of the Senior Resident Magistrate delivered on 1<sup>st</sup> March 2017 before Hon. L. T. Lewa in RMCC Case No. 73 of 2010 Mokaya Ogutu & Company Advocates –vs- Mombasa Trade Centre Limited)*

**CORAM: Hon. Justice R. Nyakundi**

**Sherman Nyongesa & Mutubia Advocates for the Appellant**

**Mokaya Ogutu Advocates for respondent**

**JUDGMENT**

This is an appeal from the Judgment and decree of the trial Magistrate in **RMCC NO. 73 OF 2010** dismissing the counter-claim filed by the appellant against the respondent.

In the Memorandum of Appeal the appellant put forth eleven grounds couched in the following language:

- (a). That the Learned Magistrate erred in Law and in fact in considering the Plaintiff's case, averments and documents in support of its case whereas the plaintiff had withdrawn its case with costs to the defendant and therefore the Learned Magistrate was in error considering that which had been withdrawn and was not before Honourable Court.*
- (b). That the Learned Magistrate erred in Law and in fact in failing to make a finding and make a declaration on whether or not the installation of the air conditioning unit was in breach of the material terms and condition of the lease agreement.*
- (c). That the Learned Magistrate erred in Law and in fact in failing to consider the terms of the Lease which constituted the contrast guiding the relationship between parties and their obligations to each other.*
- (d). That the Learned Magistrate erred in Law and in fact in failing to appreciate that the counter claim before Honourable Court was in respect to electric charges for the electricity consumption arising from the illegal installation of the air conditioning unit and NOT a claim for a service charge.*
- (e). That the Learned Magistrate erred in Law and in fact and misdirected herself in failing to apply the terms of the Lease in the interpretation of what constituted a service charge, and to that extent erroneously held that the Debit Notes issued to the respondent by the appellant were in respect to a service charge.*
- (f). That the Learned Magistrate erred in law and in fact in holding and finding that the cost of the air conditioning unit were never passed to the appellant as the lessor and further failed to appreciate that the air conditioning unit consumed electric charges specific to the demised premises which were never part of the service charge that relates to electric supply in common places.*

*(g). That the Learned Magistrate erred in law and in fact in holding that the debit notes were for unsubstantiated amounts whereas the debit notes were for standing charge which was not easily ascertainable but as a consequence of its failure to comply with the terms of Lease in regard to the installation of the air conditioning unit.*

*(h). That the Learned Magistrate erred in Law and in fact in failing to appreciate the material fact that the respondent had not denied and/or was estopped from denying its obligations to discharge the charge accruing from the electric consumption arising from the installation of the air conditioning unit in the demised suit premises.*

*(i). That the Learned Magistrate erred in Law and in fact in failing to find that the respondent had paid for debit notes raised for the similar charges for the electricity consumed subsequent to the proper installation of the air conditioning unit as per the Lease and following the Court Order in the suit.*

*(j). That the Learned Magistrate erred in Law and in fact in failing to substantively and appropriately consider the oral and documentary evidence adduced by the appellant and the elaborate written submissions filed before the Court on the part of the Appellant.*

*(k). That the Learned Magistrate erred in law and in fact delivering its Judgment after about 1 ½ years subsequent to the conclusion of the hearing and filing of the written submissions on the part of the parties and which delay may have occasioned a substantial miscarriage of justice to the appellant.*

### **Litigation history**

The record shows that the parties have been litigating through various interlocutory applications seeking one remedy after another. It is all based on the tenancy agreement. The trial court on one hand has properly addressed itself to the motions and chamber applications as pleaded and a decisive decision made on the merits.

On 3.7.2013 before **Hon. Lewa**, Learned counsel **Mr. Nyongesa** for the appellant to this appeal moved an adjournment motion on the basis that the respondent/plaintiff was hospitalized and therefore a suitable date to be taken on 30.9.2013 for the counter claim to be ventilated vide viva voce evidence.

Further, on 30.9.2013, the appellant counsel **Mr. Njunguna**, sought leave of the court to proceed with the hearing against the respondent. The witness dealt at length on the terms of the tenancy agreement with the respondent. He referred specifically to clause No. 1.8 which provided that the respondent was not allowed to do any alterations or fittings into the premises without the landlord's (consent).

According to the witness he alleged that the respondent was supposed to pay rent and service charge and in the event of an air conditioning system, being installed, the land lord should be made aware of the installation. The result was that the respondent fitted the air-conditioner though prohibited in the lease agreement but also failed to pay for it.

On the other hand, the witness for the appellant told the court that on routine maintenance checkup it was established that the air conditioner was not properly fitted and therefore required a step be taken to rectify the anomaly at a cost to be passed on to the respondent. s

The appellant then considered this as a claim to be charged against the respondent which on demand from May 2009 had remained unpaid. In support of this liquidated amount, the appellant witness placed reliance on the various debit notes. Further, the installed air conditioner photographs were also attached as independent evidence of its existence. In cross examination by the respondent counsel, the witness for the appellant confirmed that the lease agreement does not indicate such an installation as an alteration. Secondly, he also confirmed that the lease did not provide for a charge of Kshs.6,000/= plus V.A.T. for the air conditioner.

The appellant witness also stated that the Kshs.6,000/= was a standard rate ratable and the respondent was duly informed of it through a letter.

He also denied that the respondent had the liberty to instruct an air-conditioner without the consent of the landlord.

With that the hearing was adjourned to have the respondent give a rejoinder to the counterclaim. The respondent **Mr. Kennedy Mokaya** an advocate of the High Court took the witness box and challenged the appellant's evidence on the grounds that it touched on matters outside the lease agreement.

The respondent further told the court that complained air installation conditioner was done with the express authority from the management agent of the property. He acknowledged receipt of a demand note of Kshs.6,000/= plus 16% V.A.T for electricity tariff arising out of the power consumed by the installed air conditioner, which claim he vehemently denied as due and liable for settlement.

As against the known provider of power in Kenya, being KPLC, the respondent said that no such invoice was provided for by the appellant to lay claim on the Kshs.6,000/= as due and owing to the service provider, Kenya Power & Lighting Company.

He therefore stated that he disputed the amount as it was not part of the terms in the lease agreement. According to the evidence by the respondent, this new demand was a very significant change of the terms and conditions in the lease. This is what informed the decision by the Learned trial Magistrate in dismissing the impugned suit as stated in his Judgment, as follows:

***“It is not enough to throw unsubstituted figures before the court with the expectation that the court will endeavor to draw***

*meaning from them. It is the finding of this court that the defendant in its counterclaim has not been able to prove its case, the only subject of determination after the plaintiff case was withdrawn.*

*As such, and all the foregoing facts, arguments and Law duly considered, I conclusively find no substantive case made out as against the plaintiff. Thus, I go ahead to dismiss the counterclaim sought with costs to the plaintiff.”*

This profound determination by the Learned Magistrate which was given with precision unfortunately gave birth to eleven grounds of appeal to suggest that the grievance was beyond the four corners of this trial and decree of the court.

The legal contest before the trial court and on appeal points only to one suited issue:

*(1) First, whether, the plaintiff/respondent was entitled to install an air conditioner in the premises without the consent of the landlord, and if he does install one are the electricity charges that accrue chargeable to the plaintiff/respondent directly or they form part of the terms of the lease agreement.*

*(2) Secondly, was the demand of Kshs.6,000/= plus 16% V.A.T raised by the appellant due and payable by the respondent/plaintiff.*

If there are any misdirection of facts and Law, they all boil down to these two key issues. I may be wrong by taking this trajectory but in my humble view, the counterclaim of Kshs.6,000 plus V.A.T. which according to the appellant has accrued to a quantum of Kshs.206,800 plus costs and interest, is the backbone of the appeal.

In considering this appeal, I bear in mind the evidence at the trial court and the lengthy submissions advanced by both counsels. At least, in my view its purposeful to reproduce every inch of the statements made in the submissions as an efficient way to honour and appreciate the legal perspective from the parties. However, in this determination I would mirror the issues *in situ* as formulated herein above.

## **Determination**

### **Jurisdiction**

This is a first appeal and as clearly settled in Law in the already celebrated principles in **Butt v Khan {1981} KLR, Peter v Sunday Post {1958} EA 424, Selle v Associated Motor Boat Company Ltd {1968} EA 123 at 126** so far as this case stands this court must therefore examine carefully the evidence and findings of the trial court, bearing in mind that the Learned Magistrate enjoyed the advantage of being a trier of facts, a jurisdiction not available to the appellate court. It therefore becomes of paramount importance that reversing any decision of the trial court must reflect the following:

*“That the Judgment of the trial Magistrate on the facts has demonstrated on eh pointed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.”* (See **Watt v Thomas {1947} 1ALL ER 582**)

Whether on appeal or at the trial court the first principles to be observed are whether in deciding the dispute the plaintiff or claimant discharged the burden of proof as postulated in Section 107 (1), 108 and 109 of the Evidence Act.

The word proof to any trier of facts is a legal concept, and its merely an exercise of discretion appreciative of evidence and the tribunal so seized of the matter to draw on any given set of facts or evidence to make a determination. If the relevance and materiality of the evidence availed by the plaintiff is accepted. The Law directs that certain such facts existence be taken as proved as against the defendant.

In subjecting the trial court evidence to a fresh scrutiny and re-evaluation the appeal court in which I have the privilege to sit has to bear in mind that the issue of credibility, or demeanor of witnesses is of certainty, and

the province of the trial court. That advantage cannot be usurped by the first appeal court to discredit the velocity and truthfulness of a witness testimony to make an adverse inference to overturn the decision. Much of the appeal is concerned with the review of the decision made by the trial Magistrate. On careful scrutiny of the eleven grounds of appeal, for easier management and decision making process none is distinct from the other it is what I call the chain in the link to the main chain being the dispute on the installed air conditioner and the non-payment of electricity associated with its use. I hope by consolidating these grounds of appeal is not a form of abdication of duty in terms of **Peters v Sunday Post Case**.

### **Grounds 1- 11**

#### **The Law and determination**

For myself, respectfully think that the true ramifications of the dispute between the appellant and respondent stems from the tenancy agreement duly signed as an instrument to govern the relationship. Comparative decision in the cases of **Routledge v Mckay {1954}, ALL ER Duff & Ors v Newcastle United Football Ltd {2000} ALL ER**. The court held that:

*“If contract is put down in writing, any statement appearing in that written agreement will usually be regarded as a term, and any prior oral statement that is not repeated in the written agreement will usually be regarded as a representation, due to the assumption that if a statement is left out of a written agreement, the parties did not view the statement as important.”*

In order for the court to understand the relationship between two contractual parties, their intention and obligations. It is necessary to distinguish the construction of the contract instrument and interpretation accorded to the words and meaning to identify their legal effect.

**Francis Lieber {1839} book a legal and political Hermeneutics or principles of interpretation and construction in Law and politics 97, Columbia L. Rev 1710 {1997} observed:**

*“No sentence, or form of words, can have more than one true sense, and this only one we have to inquire for ..... every man or body of persons, making use of words, does so, in order to convey a certain meaning said to find this precise meaning is the object of all interpretation. To have two meanings in view is equivalent to have no meaning and amounts to absurdity. Even if a man use words, from kindness or malice in such a way, that may signify over the other thing, according to the view of him to whom they are addressed, the utterer’s meaning is not two fold, his meaning is simply not to express his opinion, actions respecting the unforeseen case.” And when the simple meaning of the text contravenes, more general and binding rules, such as constructive, written and solemnly acknowledged rules or moral ones written in the heart of every man.”*

It may be argued that **Lieber** in the above passage, was not addressing the textual framework of contract Law which is a subject matter of this appeal but it does mirror the usage and interpretation of terms and conditions in a contract entered between two parties with an intention to be bound by each if the terms.

For my purposes, whichever way one looks at the claim before the trial court and on appeal the point of departure between the appellant and respondent was the essentials of the primary tenancy agreement.

In this appeal, the appellant pleaded a counterclaim against the plaintiff/respondent that he had breached a term of the contract of installing an air conditioner without the consent of the landlord. Whereas the plaintiff/respondent avers that he sought permission from the management agent to have the installation of the air conditioner for his own use.

Aggrieved with the installation, the appellant moved into the premises carried a maintenance check including the impugned air conditioner. In this case, the appellant seems to have identified that the installation was poorly done, and required rectification.

On this particular issue, the appellant reinstated the air conditioner and the charges being electricity billing culminated into a service fee of Kshs.6,000/= plus V.A.T. That in view of the respondent continued use of the air conditioner, he has defaulted in meeting the expense which accrued at the time of litigation at Kshs.206,800/=.

It is not in dispute that there was a valid contract in place governing the obligations and duties of the disputants to this appeal. As echoed in the dicta of **Lord Scrulton** in **Rutate v Union Manufacturing Co {1918} L. R. 1KB 592** the court held:

*“That the first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract.”*

Similar to this principle is the decision in the case of **Keith Garvey v Ricardo Richards 2011{UMCA } CIV. 16** where the court outlined as follows:

*“It is a well settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules, underpin the formation of a contractual relationship and consideration for a contract to be valid, and enforceable, all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain, there must be positive evidence that a contractual obligation, born out of an oral or written agreement, is in existences ordinarily, in determining whether the parties had agreed on all the essential terms in so doing an objective test is applied. That is whether, objectively, it can be concluded that the parties intended to create a legally binding contractual relationship.”*

The respondent evidence was in total denial that he has breached any term of the contract as alleged by the appellant. He admitted having installed, the air conditioner, cannot be taken as an alteration to the premises, and further everything done was with consent of management agent. **Lord Clark** who spoke for the court on this aspect of the case in **RTS Flexible Systems Ltd v Moi Kerei Alois Muller Gou 5H8CO KG UK 2010 3 ALL ER 1** said:

*“Whether there is a binding contract between the parties and, if so upon what terms depends upon what they have agreed, it depends not upon their subjective state of mind, but upon what was communicated between them by words or by conduct, and whether, that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all terms which they regarded or the law requires as essential for the formation of legally binding relations.”(See also the Court of Appeal Case on National Bank of Kenya Ltd v Pipe Plastic Samkolil (K) Ltd & Another 2002 (EA 503))*

In light of the counterclaim, the appellant contends that the installation of an air conditioner was based on a breach of contract specifically, and to make matters worse the claim on electricity consumption incurred as a result of the extra fitting continued to be ignored by the respondent. Upon evaluating the lease agreement in all its terms including clause 1.8 there is lack of clarity that installation of the air conditioner was based on breach of contract. In any event, the installation of an air conditioner being a basic equipment for rentable premises within the Coast region cannot be advanced by the appellant as a fundamental term of the contract to constitute a breach.

Evidence, on what constitutes service charge is provided for under Clause 1.3 – 1.37 of the lease agreement dated 11.5.2009 referred from page 8-43 in the attachment of appellant documentary evidence.

The evidence given by the respondent included in averment that authority to install the air conditioner was sought from the management agent of the premises.

The appellant gave a rejoinder that the air conditioner power consumption ought to be paid as an extra charge of Kshs.6,000/= plus V.A.T. In the context of this claim can it be said that the electricity billing from Kenya Power & Lighting is item specific with regard to the premises occupied by the respondent.

In **Akbar Limited v Citi Bank {2014} JMCA CIVIL 43, Siree v Lake Turkana Elmolo Lodges 2 EA 521, Richard Okuku Oloo v South Nyanza Sugar Co. Ltd {2013} eKLR**, courts have held now and again that:

***“the claim for special damages must be indeed be specifically pleaded with a degree of certainty and particularity, but we must add, that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.”***

In the persuasive case referred of **Akbar Limited (supra)** the court held:

***“that the important point is that the defendant must not be taken by surprise, the defendant is entitled to know the type of claim made by the claimant and the amount that is being claimed.”***

**Lords Woolfs** in the dicta in **Mc Phitemy v Times News Papers {1999} 3 ALL ER 775** said:

***“That once the general nature of a claim has been pleaded, if the witness statement are exchanged no longer need to extensive pleadings they are not superfluous, they are still required to mark the parameters of the case of each party and to identify the issues in dispute but the witness statements and other documents will debut and make obvious the nature of the case that the other party has to meet.”***

In the instant appeal, the appellant through legal counsel **Maina Njanga** dated 8.9.2009 addressed to the respondent unilaterally imposed a standard rate of Kshs.6,000/= per month exclusive of valued added tax as a consumption rate of electricity in respect of the air conditioner on the demised premises occupied by the respondent.

For avoidance of doubt the relationship between the parties was governed by a written lease agreement. There was legal certainty as to the terms and obligations and consequences with regard to a breach.

What one is confronted with by this letter of 8.9.2009 was a new clause on electricity charge associated with an air conditioner ratable at Kshs.6,000/=. By virtue, of the letter, appellant action constituted a variation of the original agreement without the input from the respondent. The position in Contract Law remains sacrosanct that no variation of an agreement entered freely between the parties shall be valid unless it is also reduced into writing and signed by or on behalf of each of the parties to a contract.

This clause on electricity bill of Kshs.6,000/= does not seem to have been negotiated anywhere between the parties to the tenancy agreement. The master contract laid down the underlying terms, obligations and conditions to be observed by the parties. This new term apparently is about the interpretation the appellant accorded clause 1.8 of the tenancy agreement.

In giving effect to the general meaning of the writings in the agreement and particulars words to clause 1.8, I am unable to wholly agree that the installation of an air conditioner as a device commonly known and used in offices and residential premises within counties susceptible to high temperature weather conditions amounts to an alteration of a structure of a building or premises. In contract agreements for one party unilaterally to understand words, statements, terms and clauses to mean something else other than the plain meaning.

The appellant placed weight on the word “alteration” without consent on the disputed fact that by the respondent installing the air conditioner he was in breach of clause 1.8. that to one is far from the truth as clearly found and determined by the Learned trial Magistrate.

In my view, these two important aspects of the case being the interpretation of clause 1.8. and unilateral imposition of a payment of Kshs.6,000/= as standard charge for electricity charges per month honestly is not reflective of the agreement entered in May 2009.

Secondly, the character of a claim on specific damages ought to be specifically pleaded and proved as against the respondent. The curious position is that the appellant is not a supplier of electricity to the premises. That is a monopoly of Kenya Power and Lighting of Kenya. The bundle of debit notes to this claim served upon the respondent are not credible evidence on proper invoice and billing of ratable electricity consumption against the installed air conditioner.

To excuse untruth in that way, is to reward mendacity of the debit notes of Kshs.6,000/= that they originated from Kenya Power and Lighting. The appellant honestly and frankly should have served the correct bill upon the respondent, showing that the extra device occasioned a monthly bill of Kshs.6,000/= due and owing to Kenya Power and Lighting. Undoubtedly, the appellant is can only demand from the tenant of what is due from the service rendered within the lease agreement.

I respectfully agree with Learned counsel for the respondent submissions and the decision by the Learned trial Magistrate who dismissed the counterclaim as lacking merit.

Accordingly like him, I think no valid ground of the eleven pleaded exists for interfering with findings Judgment and decree dated 1<sup>st</sup> March 2017. To the appellants dismay, my conclusion is that this appeal fails and should be dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> DAY OF MARCH 2020

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Ms. Naliaka for Nyongesa for the appellant
2. Khalfa for the Mr. Mokaya for the respondent